Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	CC Docket No. 96-238
	)	
Amendment of Rules Governing	)	
Procedures to Be Followed When	)	
Formal Complaints Are Filed Against	)	
Common Carriers	)	

COMMENTS OF GTE

GTE Service Corporation, on behalf of its affiliated domestic wireline and wireless operating companies

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SUMMARY

GTE agrees that in order for the Commission to meet the new statutory deadlines for the resolution of formal complaints against common carriers, the existing formal complaint process will have to be streamlined. For this reason, GTE endorses the bulk of the Commission's proposals. A significant concern, however, is that considerations for streamlining procedures always be balanced against the parties' right to due process, as well as their need to establish a complete record for possible Commission and/or judicial review. Moreover, changes in the system must be avoided that will permit parties to engage in new forms of procedural abuse or to use superior legal resources to gain strategic advantages over an opposing party.

GTE supports the proposed requirement that complainants certify their attempts to settle their claims with the defendant carrier(s) prior to filing their complaints. A failure to satisfy this requirement should result in a summary dismissal of the complaint, without prejudice to re-filing after the requirement has been met. GTE also supports encouraging parties to voluntarily attempt to narrow issues and agree on relevant facts before the filing of a complaint.

Because of the increased burden that will be placed on parties answering complaints and the substantial amount of weight that will be placed on answers, GTE opposes the Commission's proposal to reduce the answering time from 30 to 20 days. GTE also believes that, under certain conditions, allegations based upon information and belief should be permitted.

GTE also supports the proposals to (1) require parties to append to their complaints documentation supporting their claims, (2) require complainants to set out in

detail the nature of their claims, both factually and legally, (3) require that proposed findings of fact and conclusions of law, with supporting analysis, be filed whenever a Commission order is sought, (4) allow waivers of the Commission's rules upon a proper showing, and (5) require parties to append copies of relevant tariffs to pleadings.

Parties should be allowed at least 15 interrogatories as a matter of right to permit them to undertake discovery when necessary. Any other form of discovery, such as depositions or document requests, should require special permission and should be allowed only on a showing of good cause.

GTE further supports the Commission's proposals to (1) allow documents to be filed on disk, (2) allow the parties to agree voluntarily to a cost recovery mechanism for discovery efforts in order to curb discovery abuses, (3) conduct status conferences 10 business days after the defendant files its answer, and (4) require a joint proposed order memorializing any oral rulings at status conferences.

GTE endorses the concept of promoting bifurcation of liability and damages issues whenever possible and in those cases where the parties cannot agree informally to an amount of damages to be paid, GTE favors referring such matters to an ALJ for final determination. GTE believes that compulsory counter-claims and cross-claims should be permitted after an answer is filed upon a showing of good cause. GTE also supports the proposals to require that parties attempt to resolve discovery disputes before filing motions and to eliminate motions to make complaints "definite and certain." GTE generally agrees that oppositions to motions will probably have to be shortened to five days, but believes that a reasonable extension (1-5 days) should be permitted upon a showing of good cause. GTE also supports the proposal regarding the treatment of

proprietary or confidential materials and the requirement for joint statements of stipulated facts and key legal issues. The Commission should consider, however, extending the filing deadline for the latter from five to ten days or to at least two days before the first status conference.

GTE believes that briefs should not be prohibited in cases where discovery is not conducted because these cases frequently involve opposing interpretations of applicable law that should be briefed to help expedite the Bureau's task. In this regard, permitting Commission staff to limit the scope of briefs should provide a reasonable middle ground

Finally, GTE firmly believes that the only way to curb frivolous complaints and discovery abuse is to impose, on a consistent basis, monetary sanctions for improper conduct. The Commission's proposal to dismiss complaints under certain circumstances is an excellent step in the right direction. For the new procedures to work at maximum efficiency, however, the Commission must impose monetary sanctions, particularly for discovery abuses, whenever appropriate. Monetary sanctions should take into account the financial means of the guilty party as well as the degree of culpability.

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COMMENTS OF GTE

GTE Service Corporation, on behalf of its affiliated domestic wireline and wireless operating companies, submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released in this docket.[1] In the NPRM, the Commission seeks comment regarding a number of proposed changes to its formal complaint process which the Commission believes are necessary to ensure its compliance with new deadlines established by the Telecommunications Act of 1996 ("96 Act") for the resolution of such complaints.

DISCUSSION

GTE agrees that in order for the Commission to meet the new statutory deadlines for the resolution of formal complaints against common carriers, the existing formal complaint process will have to be streamlined. For this reason, as discussed below, GTE endorses the bulk of the Commission's proposals. A significant concern,

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[1] FCC 96-460 (released November 27, 1996).

however, is that considerations for streamlining procedures always be balanced against the parties' right to due process, as well as their need to establish a complete record for possible Commission and/or judicial review. Moreover, changes in the system must be avoided that will permit parties to engage in new forms of procedural abuse or to use superior legal resources to gain strategic advantages over an opposing party.

I. PROPOSED AMENDMENTS

1. Pre-Filing Procedures and Activities

GTE supports the Commission's proposal to require that a complainant certify that it has attempted to discuss the possibility of a good faith settlement of its claims with the defendant carrier(s) prior to filing its complaint.[2] GTE agrees that a failure to satisfy this requirement should result in a summary dismissal of the complaint, without prejudice to the party re-filing the complaint after the requirement has been met.

Should a party claim that settlement overtures were rejected or ignored, that party should be required to attach to the certification documents reflecting the effort undertaken to resolve the matter informally. Such documentation might include letters offering to settle, time-lines reflecting the overall effort undertaken, or summaries of discussions or meetings. Once instituted, however, this requirement should not be relegated over time to a boilerplate affidavit containing only a minimum of facts and an abundance of conclusory statements. This will require that the Commission remain vigilant to ensure that in every instance a significant effort to resolve the dispute informally has been undertaken by a complainant.

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[2] NPRM at ¶ 28.

In order to avoid any chilling effect on informal resolution efforts, GTE believes that a complaining party which has engaged in good faith, but unsuccessful, settlement discussions should not be required to detail the substance of those discussions as part of the certification requirement. It should be sufficient for the party to describe the efforts in general, including, but not limited to, their duration and the relevant parties involved.

GTE agrees that an attempt by the parties to narrow issues and agree on relevant facts also should be *encouraged* prior to the filing of a complaint. For practical reasons, however, such an effort should not be mandated. Because such an effort would only be undertaken in those cases where informal resolution has failed, the effort may not be productive in some cases, particularly where informal discussions have ended on an acrimonious note.

It is not clear how a committee of experts designated to address technical issues would expedite the processing of formal complaints. Because of the myriad technical issues that could be raised, it is not likely that a standing committee would always have the expertise needed to address the specific technical issues raised. Alternatively, if a committee of experts must specially be selected to meet the needs of each case, the process may result in greater delays if, for example, the procedure for assembling the committee is not efficiently designed or the necessary pool of experts is readily not available.

2. Service

GTE supports the Commission's proposal to tighten up the process by which formal complaint documents are served. As the Commission acknowledges, the

current process by which the Commission formally serves complaints on defendant carriers frequently results in service 10 days or more after the formal filing date.[3]

The Commission proposes to require that a complaint be served directly on a defendant carrier, or its designated agent, by the complainant.[4] Upon service, the defendant carrier would have 20 days in which to file an answer.[5] While GTE generally supports this proposal, it is not clear how or when the defendant carrier is to know that the complaint satisfies the requirements of Section 208 and Section 1.721(a) of the Commission's Rules. The proposal for an "intake form"[6] is a good one but it will not guarantee that every complaint served will be compliant. Carriers should not be required to prepare answers to complaints that are deficient.

Moreover, with the greater burden of factual and legal detail, including documentation, required of answering parties by the Commission's proposed changes, GTE does not believe that 20 days to answer will be adequate. Under the Commission's proposed rules, within that 20 days, the answering party will have to (1) route the complaint to the appropriate parties to prepare an answer,[7] (2) review the allegations and prepare responses to them, including affirmative defenses, (3) prepare

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3 NPRM at ¶ 31.

4 Id.

5 NPRM, Appendix A, § 1.724(a).

6 NPRM at ¶ 34.

7 Routing the complaint to the appropriate parties will not always be a simple task, particularly for large companies consisting of multiple subsidiaries and affiliates. It may well take a day or two after service simply to get the complaint into the right hands.

a list of all witnesses "likely to have discoverable information relevant to the disputed facts . . . identifying the subjects of information,"[8] and (4) identify all "documents, data compilations and tangible things . . . relevant to the disputed facts."[9]

While in many instances, the claims and issues of the complainant generally will be known to the answering carrier through prior encounters and settlement discussions, this will not always be the case. In addition, it is not unusual for a party to adopt new or additional legal theories, or to modify its factual claims by the time it files a complaint. In short, GTE believes that the answering carrier will need at least 30 days to prepare a comprehensive, responsive and effective answer.

In addition to the increased burden that will be placed on answering parties, the Commission proposes to place a substantial degree of weight on these initial filings, to the extent of proposing a prohibition on briefs in reliance on them.[10] The heightened degree of significance placed on these filings further highlights the need for responding carriers to have sufficient time to prepare their answers. The Commission itself acknowledges that its proposals will require parties "to expend more time and resources in the initial phases of formal complaint proceedings than is the case under . . . current

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[8] NPRM at ¶43.

[9] Id.

[10] See NRM at ¶ 81; the Commission's further proposal to require proposed findings of fact, conclusions of law and legal analysis with these initial filings, which would increase the burden further, is discussed infra at subsection 11; see also NPRM at ¶ 50 (In proposing to eliminate the right to discovery, the Commission noted that "[i]t would be incumbent on complainants and defendants alike to present full and factual support for the respective claims in their complaints, answers and associated pleadings").

rules and policies."[11] GTE concurs and submits that the additional time and resources required will be substantial and strongly militate against the Commission's proposal to reduce the responding time from 30 to 20 days.

Finally, GTE supports the Commission's proposals to establish an electronic directory of agents for service of complaints,[12] to require standardized "intake" forms to be filed with complaints,[13] to require subsequent service of pleadings by overnight mail or facsimile (followed by mail delivery),[14] and to establish a separate lock box at Mellon Bank for complaints against wireless providers.[15]

3. Format and Content Requirements

GTE shares the Commission's concern that allegations made upon information and belief may not be useful in making a final decision on the merits of a complaint.[16] In addition, GTE believes that many parties rely on information and belief to allege facts that could have been ascertained with a minimum of effort or simply to allege facts that they have no reasonable basis to believe are true. Notwithstanding these concerns, GTE believes the Commission should not prohibit allegations based upon information and belief completely. Despite any requirements that the parties communicate prior to the filing of a formal complaint, it is not always possible to make all factual allegations

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[11] NPRM at ¶44.

[12] NPRM at ¶ 33.

[13] NPRM at ¶ 34.

[14] NPRM at ¶ 35.

[15] NPRM at ¶ 31.

[16] NPRM at ¶ 38.

without relying on some information and belief. Thus, rather than a complete prohibition, a party should be allowed to rely on information and belief so long as the party clearly states in its complaint that it lacks sufficient knowledge and information upon which to base an allegation and alleges that the true facts could not reasonably be ascertained by the complainant from the defendant or any other source. Failure to make such a showing for a material allegation should be grounds for striking that allegation. In addition, any sanctions imposed on a complainant for filing a frivolous claim should be increased if the material allegations of the initial claim were based on information and belief.

GTE also supports the proposals to require parties to append to their complaints documentation supporting their claims.[17] GTE cautions, however, that although this may be a simple task for a complaint alleging, for example, a violation of an interconnection agreement, relevant documentation for other claims, such as a generic unfairness claim under Section 202, may not be as readily apparent. For these types of cases, the Commission should consider something less than a dismissal, such as the issuance of a notice of deficiency, specifying the types of documents that should have been included, with a very brief time frame – such as five days – for the complainant to provide the documents. This type of procedure would avoid the time and resources of the Commission needed to dismiss the complaint, notify the defendant(s) of the dismissal, and later process the inevitably re-filed complaint.

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[17] NPRM at ¶ 39.

GTE supports the Commission's proposal to require complainants to set out in detail the nature of their claims, both factually and legally, because GTE believes it will reduce significantly the number of meritless claims that are able to survive early dismissal through artful, but uninformative, pleading.[18] GTE also supports the proposal to require that proposed findings of fact and conclusions of law, with supporting analysis, be filed with all pleadings that seek a Commission order.[19] This requirement should help expedite Commission decisions by completing a significant amount of the necessary work up front.

The Commission further proposes to allow waivers of its format and content requirements upon an appropriate showing by a party of financial hardship or other public interest factors.[20] While GTE agrees that the ability of a party to prosecute a complaint should not hinge on its ability to finance the endeavor, the Commission must be careful to avoid creating any incentive for parties to routinely seek waivers. In other words, waivers should not be so easily granted that standardized applications become routinely granted. Thus, for example, an individual acting in pro per should be required to state that he or she is not a lawyer or otherwise has no particular expertise in prosecuting such complaints. In addition, business applicants should be held to a higher eligibility requirement than individuals acting on their own behalf.

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[18] Id.

[19] NPRM at ¶ 41.

[20] NPRM at ¶ 44.

Finally, GTE supports the proposal to require parties to append copies of relevant tariffs to pleadings.[21] Identifying tariffs relevant to a claim is a basic step that should be taken prior to filing a complaint. Therefore, the proposed requirement should help expedite the processing of a complaint without creating an additional burden.

4. Answers

For the reasons discussed in subsection 2 above, GTE does not believe that it would be appropriate to reduce the time for filing answers from 30 days to 20 days. The increased burdens proposed for parties answering complaints, coupled with the added weight to be placed on answers, weighs heavily against shortening the answer time. GTE appreciates the new burdens placed on the Commission in resolving formal complaints but believes that the heightened detail required by its proposals should speed up the overall process enough to achieve new efficiencies without requiring parties to "race" to meet a deadline.

5. Discovery

Despite the tendency of parties to use discovery as a weapon to overwhelm an adversary rather than as a tool for determining the truth, GTE does not believe that the right to self-executing discovery should be eliminated entirely.[22] Although the Commission's other proposals will likely result in more facts being disclosed early on in the proceeding, thereby reducing the overall level of discovery required, it must be kept in mind that the facts disclosed up front will almost always be the ones most favorable

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[21] NPRM at ¶ 45.

[22] NPRM at ¶ 50.

to each party. Thus, discovery frequently will be needed to glean all of the pertinent facts and evidence from each side – including those not favorable to that party. The most expeditious way to achieve this is through self-executing discovery. Otherwise, unnecessary delays will occur as parties are forced to seek special permission to propound the needed discovery.[23] For this reason, GTE believes that the Commission should allow at least 15 interrogatories as a matter of right to permit parties to undertake discovery when necessary. Any other form of discovery, such as depositions or document requests, should require special permission and should be allowed only on a showing of good cause.

The Commission seeks comment on whether relevant documents identified or exchanged, but not specifically relied upon by the identifying party should be filed with the Commission concurrent with the complaint or answer.[24] GTE believes that requiring all "relevant" documents, as opposed to those upon which a party will rely, will significantly increase the risk of parties strategically including reams of arguably "relevant" documents to overwhelm or confuse the opposing party. The better approach may be to require all documents that each party intends to rely upon, with the understanding that each party will be allowed to supplement that set of documents with others obtained from the opposing party through discovery. This approach would serve

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[23] GTE has no doubt that the complete elimination of discovery will result in a proliferation of discovery motions. By their very nature, lawyers are not inclined to pass up any avenue that holds even a remote promise of evidence favorable to their clients. Moreover, it may be arguable that the failure to move for discovery in a given case may be inconsistent with the lawyer's ultimate obligation to protect the interests of its client.

[24] NPRM at ¶ 53.

at least two goals. It would force each side to critically examine the documents in its possession to determine which of those are truly material to reaching a decision in the case. It also would preclude parties from producing pertinent documents for the first time late in the proceedings on the grounds that they were not requested in discovery or not otherwise "relevant" at the outset.

As to the possibility of documents being produced on disk, GTE would support such an alternative but has concerns that making it mandatory may make complaint proceedings too "high tech" for some parties.[25] Because no party enjoys producing page after page of documents, it is likely that many parties will agree to such an arrangement if the Commission allows it. Thus, GTE recommends that the ability to provide documents on disk be made available to all parties who mutually agree to it. This would alleviate any potential burden to parties that do not have the necessary resources, while still providing a benefit to the parties and the Commission in those cases where the ability does exist.

The Commission also seeks comment on its proposal to allow the parties to agree voluntarily to a cost recovery mechanism for discovery efforts in order to curb discovery abuses.[26] While this ability will certainly benefit parties intent on engaging in good faith discovery, it may be of little or no use to parties having no such intent. A party intent on abusing the discovery process likely will not agree voluntarily to any mechanism that would require it to pay for the opportunity. Nonetheless, as with the

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[25] NPRM at ¶ 53.

[26] NPRM at ¶ 54.

ability to file documents on disks, the ability to enter into such agreements should benefit the overall process.

Finally, GTE favors the Commission's proposal to refer factual disputes to administrative law judges ("ALJs") for expedited hearings.[27] GTE further agrees that the specific factual issues designated for ALJs should be only those identified by the Bureau as critical to a decision in the matter.

6. Status Conferences

GTE supports the Commission's proposal to conduct status conferences 10 business days after the defendant files its answer.[28] It has been GTE's experience that status conferences usually help the parties narrow issues, agree to streamlining procedures, and generally promote communication between the parties. The proposal to require a joint proposed order memorializing any oral rulings at status conferences is an excellent one so long as the Commission appreciates that all parties do not always remember the terms of oral rulings in the same way. Thus, the requirement should allow the parties to submit proposed orders that include the parties' respective versions of oral rulings if there is any disagreement. Of course, the Bureau will determine ultimately which version is correct.

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[27] NPRM at ¶ 56.

[28] NPRM at ¶ 58.

7. Damages

GTE endorses the concept of promoting bifurcation of liability and damages issues whenever possible.[29] It has been GTE's experience that damages issues tend to be more complex and time-consuming than liability issues. For this reason, they tend to dominate the discovery phase if bifurcation does not occur. On the other hand, bifurcated proceedings tend to result in less burdensome discovery and, where liability is found, the defendant generally has a strong incentive to settle the damages issue informally.

In those cases where the parties cannot agree informally to an amount of damages to be paid,[30] GTE favors the Commission's proposal to refer such matters to an ALJ for final determination.[31] The ALJ should have the ability to require the parties to produce such information and evidence as may be necessary to determine the exact amount of damages. The scope of the ALJ's mandate otherwise must be limited, however, to avoid the potential of re-litigating a case under the guise of a damages proceeding.

8. Cross-Complaints and Counterclaims

GTE agrees that the Commission's proposal to bar compulsory counterclaims unless they are filed concurrently with an answer will impose more discipline on the

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[29] NPRM at ¶ 66.

[30] To facilitate this process, GTE supports the proposal to require the complainant to submit a detailed computation of alleged damages. (NPRM at ¶ 66.) A computation method directed by the Commission would provide a good starting point for discussions.

[31] NPRM at ¶68.

process and assist in meeting the new statutory deadlines.[32] GTE believes, however, that some flexibility should be afforded in those cases where a party is not aware, and could not reasonably have been charged with knowing, that it had a claim arising out of the same transaction or occurrence as the subject matter of the complaint. Upon a showing of good cause, a party should be allowed to assert a compulsory counter- or cross-claim after answers have been filed. Generally, belated claims of this type should be rare and should not unduly delay the resolution of the proceedings as they will generally involve the same operative facts -- only the legal theory of recovery will be new.

9. Replies

GTE agrees that replies to answers generally do little to further the resolution of formal complaints and should only be allowed upon a showing of good cause.[33] The ability to file replies upon a showing of good cause should also be extended to replies to motions.[34] In many cases, an opposition may distort the facts or, deliberately or not, mislead the Commission regarding pertinent issues. A party should be allowed to reply in such instances.

GTE supports the proposals to require good faith attempts to resolve discovery disputes before filing motions and to eliminate motions to make complaints "definite and

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[32] NPRM at ¶ 70.

[33] NPRM at ¶ 72.

[34] NPRM at ¶ 73.

certain."[35] GTE generally agrees that oppositions to motions will probably have to be shortened to five days,[36] but believes that a reasonable extension (1-5 days) should be permitted upon a showing of good cause. The same flexibility should be afforded amendments to complaints to add claims that were not known, and could not reasonably have been known, at the time the complaint was filed. Upon a showing of good cause, such amendments should be allowed. In general, however, the need for such amendments should be rare.

10. Confidential or Proprietary Information and Materials

GTE supports the Commissions proposal to permit parties to designate as proprietary any materials generated in the course of the proceeding.[37] If a designation is challenged, it is appropriate for the party asserting the protection to bear the burden of supporting the designation.

11. Other Required Submissions

The Commission's proposal to require a joint statement of stipulated facts and key legal issues should help expedite complaint proceedings significantly.[38] The proposed deadline of five days after the answer is filed, however, is extremely aggressive. Because five days is an extremely short time frame, and because such stipulations will only be of real value if they are accurate and comprehensive, the

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[35] NPRM at ¶ 57 & 76.

[36] NPRM at ¶ 77.

[37] NPRM at ¶ 79.

[38] NPRM at ¶ 80.

Commission should consider extending the filing deadline either to ten days or to at least two days before the first status conference.

GTE believes that it would not be appropriate to prohibit briefs in cases in which discovery is not conducted.[39] Cases that do not require discovery usually involve opposing interpretations of the applicable law. In such cases, having both sets of interpretations prior to deciding the case will help expedite the Bureau's task while allowing each party to establish a complete record. In this regard, permitting Commission staff to limit the scope of briefs should provide a reasonable middle ground.[40] In addition, the Commission should consider soliciting, either formally or informally, the parties' views on which facts and law they believe are central to a final decision.

Finally, GTE favors the proposal to allow Commission staff to establish briefing timetables as may be required by the factual and legal complexity of a case.[41] In the absence of a staff ruling, the parties should be limited to 25 pages for the initial brief and 15 pages for the reply brief.

12. Sanctions

GTE firmly believes that the only way to curb frivolous complaints and discovery abuse is to impose, on a consistent basis, monetary sanctions for improper conduct. The Commission's proposal to dismiss complaints under certain circumstances is an

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[39] NPRM at ¶ 81.

[40] Id.

[41] NPRM at ¶ 82.

II. CONCLUSION

GTE believes that changes to the Commission's formal complaint process cannot be avoided if the Commission is to meet the new deadlines of the 96 Act. As discussed above, GTE endorses the bulk of the Commission's proposals. However, because the Commission's proposals will result in significant new burdens being placed on answering parties -- as well as heightened importance being placed on the answers themselves -- and because other measures should speed up the overall process significantly, GTE feels strongly that the time for answering complaints should not be changed from the existing 30 days.

Respectfully submitted,

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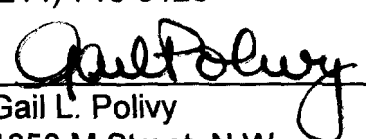
By 

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